No. 87-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BARRY KRUPKIN, et al.,

Petitioners,

v.

DOW CHEMICAL CO., et al.,

Respondents.

In re "Agent Orange" Product Liability Litigation

BRIEF OF AGENT ORANGE PLAINTIFFS' MANAGEMENT COMMITTEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PARTIES

Respondents are members of the class who are represented by court-appointed lead counsel to the class, designated in the courts below as the Plaintiffs' Management Committee ("PMC"). As of October 1, 1987, 248,515 individual members of the class have made claims against the settlement fund. To avoid burdening this Court and its staff with the citation of 248,515 names, Mr. George Ewalt, who was one of the named representative plaintiffs in the courts below, has been designated as the named respondent for purposes of Rule 28.1.

This brief filed by the PMC is related to the Krupkin petition only. The various petitions for certiorari arising out of the Agent Orange litigation are unrelated to each other and should be separately considered.

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PRELIMINARY STATEMENT

This appeal represents the final effort by a single petitioner to undo nine years of complex litigation, involving multiple parties, novel legal claims, and the emotions of thousands of veterans aggrieved by the aftermath of an unpopular war. The cases were tentatively settled on May 7, 1984 for the sum of $180 million, between the representative plaintiffs and all defendants subject to court approval. A sole petitioner claims that additional benefits

are to be gained by further litigation and delay. Two district court judges and all of the judges of the Second Circuit Court of Appeals have voiced virtually unanimous views concerning various issues raised in the litigation below. Each of those courts applied well-settled legal criteria in rendering exhaustive opinions unanimously approving the class action settlement reached by the parties.

Since petitioner is unable to isolate any particular issue that might warrant the attention of this Court, he urges that certiorari be granted respecting every issue considered by the Court of Appeals in affirming the settlement's approval. Unable to show any error in the Circuit Court's application of well-recognized principles bearing on the single question presented—whether the settlement should be approved—the petition raises multiple assignments of claimed error without setting forth any error in affirming approval of the settlement. The aggregate effect of these multiple claims does not add substance to any one of them.

This case presents no question of constitutional moment, no issue that has generated a split in the circuits, and no facts that indicate that rulings by this Court will assist future courts or litigants. Instead, the petition affirms the PMC's contention that this litigation involves facts that, while emotion-filled from the human and political perspectives, are, from the legal perspective, either unique to themselves or mundane. There is no merit in further delay in the implementation of the settlement reached by the parties as approved and affirmed by the Courts below.

STATUTES AND RULES INVOLVED

Fed. R. Civ. P. 23(b)(3)

RULE 23. Class Actions

* * *

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

28 U.S.C. §1332

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 U.S.C.S. §1603(a)], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 U.S.C.S. §1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE CIRCUIT COURT'S RELIANCE ON THE GOVERNMENT CONTRACTOR DEFENSE DOES NOT WARRANT GRANT OF CERTIORARI.

The petitioner suggests that a grant of certiorari is warranted in this case on the "issue" of the government contractor defense because this Court has granted certiorari in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted* 107 S.Ct. 872 (1987), and has been asked to consider another case, *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985). A review of the disparities among these cases, however, reveals that a grant of certiorari in the instant litigation is neither proper nor necessary.

Both *Boyle* and *Shaw* present this Court with the issue of whether military contractors who do or should have knowledge of product defects not shared by the government are entitled to share the government's immunity from liability for service-related injuries caused by those defects. It is on this factual issue of disparate knowledge and the implication of some courts that contractors must inform the government of alternative products that the Circuit Courts of Appeal may be said to be in conflict. In no case, however, including *Boyle* and *Shaw*, has a Circuit Court of Appeals denied a military contractor immunity where the government possessed knowledge of the alleged hazard equal to that of the contractor. *See, e.g., McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), *Koutsoubos v. Boeing Vertol, Division of Boeing Co.*, 755 F.2d 352 (3rd Cir.),

cert. denied, 106 S.Ct. 72 (1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985). The Agent Orange litigation, like those cases, presents an instance of equal knowledge.

The Second Circuit understood that "the information possessed by the government at pertinent times was as great as, or greater than, that possessed by the chemical companies." 818 F.2d at 190, and *see*, 818 F.2d at 174. That same finding was made by the District Court in approving the settlement, 611 F. Supp. at 1263, and is not challenged here. The Second Circuit had no doubt that the government possessed relevant information necessary to permit a meaningful comparison of risks and benefits of the product, i.e., the comparison that forms the basis of *all* formulations of the defense. *See* 818 F.2d at 193.

Petitioner's suggested parade of horribles emerging from the Second Circuit's formulation of the defense in this case is simply fictitious. The Court of Appeals made no holding as to a proper formulation of the defense. It determined that under *any* proper formulation, the defense posed a substantial risk to the plaintiffs. Implicit in the Second Circuit's rationale is the well-accepted view that government contractors will be liable if they possess greater material information than the government relevant to a decision to employ a specific product. Thus, the Second Circuit, in common with all other circuits, recognizes appropriate incentives for contractors to ensure that the government has equal relevant knowledge with respect to potential hazards.

The only thing the Second Circuit has decided in this litigation is that any applicable test would have been satisfied considering the evidence presented in this litigation. The purported issue as to whether a contractor may be liable for failure to inform the government of hazards of which the government may be ignorant or of alternative products about which the contractor did or should have

known (the questions presented by *Boyle* and *Shaw*) is simply not implicated in this case.

While the Second Circuit's opinion affirming approval of the settlement discussed the role that the government contractors defense played in the litigation, its discussion does not constitute a holding as to any particular element or facet of the defense. It merely holds that the defense, however properly formulated, was likely to work a potential dismissal of all of the plaintiffs' claims and, therefore, became a significant factor in the Court's determination that the approval of the settlement by the District Court was appropriate.

It is ironic that petitioner attempts to achieve a grant of certiorari on this alleged issue, since the Second Circuit found that the petitioners "inexplicably and unjustifiably" failed to address adequately the issue they now deem so crucial. 818 F.2d at 173, referring to 818 F.2d at 187-190. Granting a writ of certiorari in these circumstances would be in direct contravention of this Court's general policy that issues not properly presented in lower courts cannot be raised at the final level of appeal.

Finally, the only issue which could properly be before this Court would be the Second Circuit's affirmation of the settlement. It affirmed the District Court's approval thereof in light of the *many* significant obstacles the plaintiffs had to *any* recovery. This included the possibility that the defendants would have successfully pleaded and proven the government contractor defense. The issue, then, is *not* whether that defense was fully established, but whether—if the case had proceeded to trial—it may have been established. The District Court determined that defendants would have been entitled to summary judgment. One can hardly conclude that such a case did not warrant settlement by plaintiffs.

A redetermination by this Court in 1987 or 1988 of the appropriate elements of the government contractor defense does not bear on whether the plaintiffs had good cause for concern in 1984 that the law prevailing at that time would bar recovery. The defense gave plaintiffs good cause for concern; it was a substantial factor militating in favor of settling the litigation. There is nothing, therefore, contained in the Circuit Court opinion affirming the settlement which merits Supreme Court review.

II.

NO IMPORTANT QUESTION OF FEDERAL LAW OR POLICY IS AT STAKE WARRANTING FURTHER JUDICIAL REVIEW; THE AGENT ORANGE LITIGATION IS *SUI GENERIS* AND OF LITTLE PRECEDENTIAL VALUE.

This Court should not grant certiorari in this litigation, in part because the plaintiffs' claims do not arise under the constitution, any specified federal statute, or under federal common law. In an earlier phase of this proceeding the Second Circuit decided that there is no identifiable federal policy at stake in this litigation. 635 F.2d 98 (2d Cir. 1980).

The Solicitor General of the United States agreed with the Second Circuit in its brief for the United States as *amicus curiae* in November 1981. The Supreme Court denied certiorari. 454 U.S. 1128 (1981).

As a consequence of the Second Circuit's decision, the class action thereafter proceeded in the District Court solely on the basis of diversity jurisdiction under 28 U.S.C. §1332. It constituted essentially an action between private parties for personal injury sounding in tort. The disposition of plaintiffs' claims through settlement of the litigation carries little, if any, weight in terms of the constitution, federal statutes, federal common law, or even federal policy.

Certiorari is also inappropriate because the litigation actually has little, if any, precedential value. The Agent Orange cases arose out of the conduct of the Vietnam war. They involve a cauldron of factual issues relating to military action, political controversy, scientific and medical matters, each of great complexity, controversy, and uncertainty. No other pending or prior litigation anywhere in the country comes to mind which deals with the factual scenario underlying the Agent Orange controversy.

With considerable understatement, the Second Circuit characterized the Agent Orange litigation as "an extraordinary piece of litigation" (818 F.2d at 148), whose "most noticeable fact is the pervasive factual and legal doubt that surrounds the plaintiffs' claims" (818 F.2d at 149). Issues creating such doubt included problems of liability, causation, choice of law, statutes of limitations, the government contractor defense, indeterminate plaintiffs and defendants, and problems inherent in nation-wide class action management. 818 F.2d at 172-74.

This unique combination of wartime genesis and factual complexity makes the litigation *sui generis*. There never was a case like Agent Orange; it is unlikely to occur again. Its facts are so unusual as to negate any precedential value in other litigation. In fact, the Second Circuit has directly restricted its precedential value by emphasizing its uniqueness and pointing out the novelty of the District Court's pretrial rulings in some areas. It expressed sufficient skepticism as to the acceptability by other courts of the District Court's view on choice of law to sharply restrict its precedential weight. 818 F.2d at 173.

Fortunately, the litigation was settled, mooting all of the disputed issues of law and fact which were in contention prior to the settlement.

The Court of Appeals' decision does not establish precedent for opening the floodgates of class action litigation in any type of mass tort cases. The Court commented on the individuality of the causation issue (818 F.2d at 165). It agreed with the prevalent skepticism over the usefulness of class actions in other tort litigations, and it allowed class certification in this case only because of its finding that the military contractors defense raised common questions central to all claims under F.R.C.P. Rule 23(b)(3). (818 F.2d at 150, 164-67).

The Second Circuit recognized that the Agent Orange case and its settlement were largely the result of coincidental nonrecurrent factors when it stated,

> The weakness of the evidence of causation as to all plaintiffs and the strength of the military contractor defense enabled the district court to evaluate the settlement accurately and to fashion an appropriate distribution scheme in the instant matter. We regard those factors as largely coincidental and not to be expected in all toxic exposure cases. 818 F.2d at 166.

Since this litigation has little precedential value, a grant of certiorari would be unnecessary and improper.

III.

THE SUPREME COURT HAS CONSISTENTLY DENIED CERTIORARI IN THE AGENT ORANGE LITIGATION AND OTHER ANALOGOUS CLASS ACTIONS.

Issues fundamentally identical to those urged by petitioner here have been raised in prior Agent Orange proceedings. Following class certification (100 F.R.D. 718, E.D.N.Y., 1980), the defendants asked the Second Circuit to issue a writ of mandamus to vacate the certification. In denying the petition, the Court of Appeals stated "it seems likely that some common issues which stem from

the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial." *In Re: Diamond Shamrock Chemicals Company*, 725 F.2d 858, 860-61 (2d Cir. 1984). The Second Circuit also observed that the class notice ordered by the District Court was arguably the best practicable under the circumstances. It further indicated that the propriety of a class certification might be fully reviewed by it on a later appeal (725 F.2d at 862).

On petition filed by the defendants, the Supreme Court denied certiorari, 465 U.S. 1067 (1984), suggesting that the Court found it inappropriate to intervene in the mechanical aspects of the Agent Orange litigation.

The full review alluded to by the Second Circuit was in fact made in 818 F.2d at 146 on the appeal from Chief Judge Weinstein's orders (100 F.R.D. 718 and 597 F. Supp. 740) certifying the plaintiff class and approving the settlement. After carefully reviewing the exhaustive opinions of the District Court, the Court of Appeals again concluded that class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense (818 F.2d at 166). It also concluded that the District Court's notice plan was fully adequate under the circumstances (818 F.2d at 169). Relying on Supreme Court precedents, the Second Circuit based its conclusions on the facts that:

a. Rule 23 accords considerable discretion to a district court in fashioning notice to a class, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); and

b. The standard of appellate review is whether the district court was clearly erroneous in its factual findings and whether it abused its traditional discretion. *Albermarle Paper Company v. Moody*, 422 U.S. 405 (1975).

The Second Circuit properly noted it to be inappropriate to second-guess a district court's class notice procedure, "particularly [where] no alternative method of ascertaining class members' identities has been suggested to us," citing *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), a case supporting the view that this Court should not "second-guess" both the District Court and the Second Circuit by reviewing the adequacy of the notice plan adopted by Chief Judge Weinstein, which the Court of Appeals described as "appropriate to this unique case" (818 F.2d at 167).

In the present context of this litigation, settled and fully approved by both the District and Second Circuit courts, there is less reason to review the District Court's management of the action and its settlement.

The Supreme Court's practice is to decline taking cases to review factual issues where the findings of fact made by the district court receive the concurrence of the Court of Appeals. In those situations the Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) (and cases cited therein), *reh. gtd. on other grounds*, 339 U.S. 605 (1950); *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967).

Settled Supreme Court practice operates against review of the adequacy of post-settlement procedures conducted by Judge Weinstein. When asked to review aspects of class action settlements, the Court has consistently denied certiorari. For example, in *In Re: Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5th Cir. 1981),

cert. denied, 456 U.S. 998 (1982), the Court held that there is no absolute requirement that a distribution plan be formulated prior to notification of a class of settlement. It has also been held that a court "should not turn a settlement hearing 'into a trial or rehearsal of the trial,' " *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

Even allegations of collusion in the negotiation processes culminating in class action settlements have failed to persuade the Supreme Court to grant certiorari. *Parker v. Anderson*, 667 F.2d 1204 (5th Cir.), *cert. denied*, 459 U.S. 878 (1982).

The only standard set out in Rule 23 regarding approval of class action settlements is, under applicable authorities, that settlements generally should be fair, reasonable and adequate. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). There is no reason for the Supreme Court to substitute its own factual standards for those the lower courts have established for judging what is fair, reasonable, and adequate. The trial court has before it direct knowledge of all of the facts, circumstances, and contentions of the parties and is, therefore, obviously in the best position to determine the overall fairness of such settlements. This is one reason why the standard of appellate review in the Court of Appeals eliminates second guessing, and relies upon the traditional abuse of discretion standard.

Since the *Krupkin* petition merely contains a rehash of arguments made in the Second Circuit, its request for a grant of certiorari is that the Supreme Court substitute its own judgment for that of the trial court on factual issues, traditionally an improper subject matter of Supreme

Court review. *See, e.g., Fields v. United States*, 205 U.S. 292 (1907); *United States v. Johnston*, 268 U.S. 220 (1925), and *N.L.R.B. v. Waterman SS Corp.*, 309 U.S. 206, *reh. denied*, 309 U.S. 696 (1940).

Denial of certiorari in this litigation is prudent because fairness, reasonableness, and adequacy must be judged in light of the "totality of the circumstances." *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). The "totality of the circumstances" in this litigation, as in other class action settlements, is best judged by the district court which was closest to the litigation. This is particularly true where, as here, the extensive opinions of the District Court were meticulously reviewed under proper standards and affirmed by the Second Circuit.

IV.

THE SETTLEMENT IS IN ALL RESPECTS FAIR, REASONABLE, AND ADEQUATE; GRANTING A WRIT OF CERTIORARI WOULD IRREPARABLY INJURE VETERANS AND THEIR FAMILIES.

In its simplest form, the petition contends that the settlement constitutes less money than a single objector feels should be paid to the veterans. Somehow, in the opinion of the petitioner *only*, further litigation would lead to more money.[1]

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[1] This situation is similar to circumstances apparent in the petition in *Pinkney, et al. v. Dow Chemical Company, et al.*, No. 87-437. In the PMC's response to Mr. Pinkney's petition, defects are noted. The same arguments therein apply to Mr. Krupkin as well as his counsel, Mr. Musslewhite. Like Mr. Pinkney's counsel (Ashcraft & Gerel), Mr. Musslewhite urged class certification and sup-

(Footnote continued on following page)

Much of the petition is directed at disagreements with the District Court and Court of Appeals regarding the facts of the case. No substantial disagreement is raised with the Courts' use of proper standards and criteria for determining propriety of the settlement. Mr. Krupkin's expounded wish is for a trial rather than settlement. He concedes, however, that if the case is settled, he simply wants more money for the class. This result is unachievable.

While couched in terms of what the "veterans wish to see" in this, their litigation, throughout the course of these proceedings there has not been identified one veteran who has either properly opposed class certification or the concept of settlement. At this point, only two objectors, Krupkin and Pinkney, both arguably without standing, and neither objecting in the court below, have taken it upon themselves to risk the only actual substantial benefit achieved through any device for Vietnam veterans who claim to be affected by the Agent Orange herbicides. Neither objector seems to acknowledge the PMC's overriding responsibility to the class as a whole. That responsibility was to weigh *all* factors present in the litigation

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[1] *continued*
ported the notice given by the trial court at all times prior to the settlement. Mr. Musslewhite was a member of the PMC who spoke wholly in favor of the tentative settlement (which he agreed to) throughout the process of the fairness hearings. It was only after Chief Judge Weinstein entered his order respecting class counsel fees that Mr. Musslewhite resigned from the PMC and then began to contest the settlement. The PMC has further noted the question as to the petitioner's standing. More importantly, veterans who objected in the court below to class certification had the opportunity to opt out (and did so). These claims are not properly raised by the petitioner. The petition is not brought by any veteran who has indicated he has been harmed in any way. Implicit in the petition is the underlying fact that it is brought by lawyers who seek self-reward.

in determining whether to forge forward through a trial of the case or to tentatively accept the settlement offered by the defendants.

The approval of the District Court confirms that all factors present in the litigation militated in favor of the settlement. Chief Judge Weinstein emphasized in part the difficulties all the plaintiffs faced in proving the necessary element of medical causation. The Court of Appeals, acknowledging that, and also taking into account all factors in the litigation, chose to emphasize the difficulties the plaintiffs faced with the government contractors defense and the pervasive factual and legal doubt surrounding plaintiffs' claims. Both Courts, however, were in full agreement that all factors weighed in favor of the benefits conferred by the settlement as opposed to the risks of continuing the trial effort. The risk of ultimate loss by reason of one or more of these factors constitutes a large part of the equation. Another factor was the prospect of years of continued legal effort with no certainty of any recovery. All factors were substantial considerations in the PMC's exercise of its best judgment in deciding to settle.

The veterans who will benefit by the settlement are in desperate need of monetary aid now. This is not a class action such as some commercial cases involving numerous claimants waiting for a small amount of money in refund for a commercial transaction. To the contrary, these veterans need direct medical aid and indirect aid to help them take advantage of benefits available from other sources, including veterans' programs, which thus far have been denied them.

The petitioner belittles the amount of the settlement. He fails to note that the principal on deposit in the fund, at the average rate of interest being earned, leads to income in excess of $1,150,000.00 per month. The fund con-

fers life-improving benefits upon large numbers of the class. These are benefits available to them from no other source. They were achieved through hard lawyering in a litigation that resulted in a concrete settlement that is ripe for distribution. The *Krupkin* petition reveals no more than wishful speculation on the part of petitioner and his counsel. Petitioner has not suggested any workable, practical alternative to the settlement. His wish for a trial is likely to result in a complete loss of any benefit to the class. The petitioner's request, if granted, would ensure years of continued litigation, years of continued burden on the part of all parties concerned, years of a lack of financial and other aid to the veterans, more frustration, a continued high level of emotionalism, and an increased lack of ability on the part of the veteran population to integrate the balance of their lives into society.

The PMC has never contended that the settlement of this litigation is the cure for the veterans' ills. The Judges below have all agreed with the PMC's exercise of responsibility and best judgment that the settlement is a fair, reasonable, and adequate resolution, not of all of the problems of the Vietnam veterans, but of the litigation.

The Agent Orange settlement has grown with the accrual of interest to nearly $230,000,000.00. No other fund of any consequence is available to compensate the veterans for their suffering. The United States Government has denied that their injuries and diseases are service connected or caused by exposure to Agent Orange. Hence, with few exceptions, it has stubbornly rejected their claims for benefits.

The Second Circuit summed up its approval of the adequacy of the settlement in these words:

> Within the sharply limited judicial role we must ask whether the settlement of the litigation proposed by the parties' representatives is acceptable. For the reasons indicated below we tentatively hold that it is. It gives the class more than it would likely achieve by attempting to litigate to the death. It provides funds to help at least some men, women and children whose hardships will be reduced in some small degree. It does represent a major step in the essential process of reconciliation among ourselves. (818 F.2d 145).

But the settlement does considerably more than that. The distribution plan spells out the benefits to the veterans (see 597 F. Supp. at 858-61 and 611 F. Supp. 1396). It provides veterans with the opportunity to establish effective means of representing their interests. The district court recognized "the settlement provides a powerful legal, medical, political, and social instrument" (597 F. Supp. at 858).

CONCLUSION

Since 1979, the Agent Orange litigation has been a nationwide lightning rod generating interest and emotional controversy. It has also generated despair and has imposed a vast burden upon the resources of the federal judiciary. The PMC believes that it is and has been time to end the legal controversy. It should be removed from the legal shackles the courts necessarily impose. It is time to begin channeling the fund to the veterans. They can then constructively begin addressing their present and future needs. A denial of certiorari is the final step in ensuring the beginning of that positive process.

The District Court observed, and the Second Circuit agreed, "the plaintiffs were also seeking larger remedies and emotional compensation that were beyond its power to award" (597 F. Supp. at 747; 818 F.2d at 148). It is a tribute to both of the lower Courts that they have wisely approved the settlement of plaintiffs' claims in view of the denial by the executive and legislative branches of our government. The judicial branch has permitted the fashioning of a settlement which affords the veterans at least some of the tools with which to work toward better lives, larger remedies, and the emotional compensation they desparately desire. For the Supreme Court to interfere with and delay this process of reconciliation, particularly upon the grounds asserted in the petition, would lead to the reopening of old wounds upon no proper legal ground. There is no valid reason for this Court to allow such delay.

The Agent Orange controversy is a classic instance of a litigation which should not be the subject matter of a grant of certiorari. It is a once in a nation's lifetime case. Some of our finest judicial talent has exhaustively reviewed all of its circumstances. Because of its uniqueness it has no serious potential for establishing any judicial precedent. It is the type of case which this Court has consistently found undeserving of certiorari. The legal issues on which certiorari is sought were previously properly denied in earlier phases of the litigation.

Finally, a grant of certiorari is likely to irreparably injure the veterans who have already suffered from events which began in the 1960s and which have been relived during the long years of this litigation. There is no preferred alternative to the settlement. To deny certiorari is legally proper, practically effectuating the disbursement of life-improving benefits to class members, and morally correct.

We respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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